Opinion issued November 14, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00493-CV

ANDREW WHALLON, Appellant

V.

CANDLELIGHT TRAILS I ASSOCIATION, INC., Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2008-51588A

MEMORANDUM OPINION

In a previous lawsuit in 2008, the City of Houston[1] brought a nuisance and condemnation action against the owners of a condominium complex, known as Candlelight Trails Condominiums, located in northwest Houston. *See Whallon v*

[1] The City of Houston is not a party to this appeal.

City of Hous., 462 S.W.3d 146, 152 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). Appellant, Andrew Whallon, who owned fourteen units in the complex, brought cross-claims against the owners' association, appellee Candlelight Trails I Association (the "Association"), for negligence, breach of contract, and breach of fiduciary duty. *Id.* Whallon alleged that the Association had allowed the complex to fall into the hazardous condition precipitating the City's lawsuit. At the close of trial in 2010, the trial court signed an agreed order authorizing the immediate demolition of the complex and apportioning demolition costs against each of the owners, including Whallon. *Id.* at 153. The trial court granted Whallon's request to sever his cross-claims. *Id.* On appeal from the main case, this Court affirmed the trial court's judgment against Whallon. *Id.* at 173.

In 2018, eight years after the trial court severed Whallon's cross-claims against the Association into the instant suit, the trial court dismissed his claims for want of prosecution. It is from this order that Whallon now appeals. In two issues, Whallon contends that the trial court erred in dismissing his cross-claims, and in denying his motion to reinstate, because "the facts and circumstances throughout the case show that the case was either proceeding in development through discovery . . . or was otherwise derailed in its development by unavoidable and tragic events, totally outside [his] and [his] counsel's control."

We affirm.

Background

For nine months after the trial court's severance of Whallon's cross-claims into the instant suit, there was no activity in the case. On August 8, 2011, the trial court issued a Notice of Disposition Deadline, setting a deadline of September 12, 2011 and instructing: "If you have not set and had this matter heard before the disposition deadline this case will be DISMISSED FOR WANT OF PROSECUTION on that date without further notice. Hearing dates may be obtained from the court coordinator . . . ." Whallon moved to retain the case, asserting only that his trial counsel had misplaced the notice while moving her office. The trial court granted the motion and issued an order retaining the case.

Nine months later, in June 2012, there again having been no activity in the instant case, the trial court issued a second Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution. Whallon moved to retain the case, citing "[c]onfusion and miscommunications" regarding the reporter's record in the appeal of the main case. The trial court granted the motion and retained the case.

Ten months later, in April 2013, there again having been no activity in the instant case, the trial court issued a third Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution. Whallon moved to retain the case, asserting that his trial counsel was suffering from certain health issues and that this case was still within the eighteen-month administrative deadline set by the Texas

Supreme Court for the disposition of civil jury cases.[2] He asserted that the administrative period commenced on the date of the defendant's appearance and that, here, although the Association had appeared and answered the City's claims in the main case, the Association had not answered his cross-claims. The trial court granted the motion and retained the case.

In July, August, and September 2013, there again having been no activity in the instant case, the trial court issued its fourth, fifth, and sixth Notices of Disposition Deadline, stating its intent to dismiss the case. Whallon again moved to retain the case, asserting that the case was still within the supreme court's eighteen-month administrative deadline because the Association had not yet filed an answer. The trial court twice signed orders retaining the case.

On February 6, 2014, there still having been no activity in the instant case, the trial court issued a seventh Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution unless the matter was set and heard by March 17, 2014. On April 2, 2014, the trial court dismissed the case for want of prosecution, stating that Whallon had failed to comply with the notice. Whallon

---

[2] "Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket." TEX. R. CIV. P. 165a(2). Under those rules, trial courts "should, so far as reasonably possible," ensure that all civil jury cases, not brought under the Texas Family Code, are brought to trial or final disposition "[w]ithin 18 months from appearance date." TEX. R. JUD. ADMIN. 6.1(a)(1).

moved to reinstate the case, citing his trial counsel's health and staffing issues. The trial court issued an order reinstating the case.

In August 2014, the trial court issued an eighth Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution. Matthew Walker, counsel for the Association in a related case, filed a letter informing Whallon's counsel that all of the Association's records had been transferred to the City of Houston, who had obtained ownership of the condominium complex after it was closed. He noted that the Association had long since forfeited its corporate existence and had no assets. Whallon moved to retain the case so that he could "explore [his] options." The trial court issued an order granting the motion and retaining the case.

In December 2014, Whallon's trial counsel died. Thereafter, counsel's sister and law partner, Denise Wells, took up Whallon's case.

It is undisputed that, on March 26, 2015, the Association, represented by Walker, filed an Original Answer to Whallon's cross-claims.

Five months later, in August 2015, there having been no activity in the instant case, the trial court issued its ninth Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution. Wells, on behalf of Whallon, moved to retain the case. Wells asserted that, although the Association had filed an answer on March 26, 2015, the electronic notice of filing "went undetected" and the mailed

notice was sent after Wells had moved her law office. Wells requested 90 days to review the case to determine whether she would agree to represent Whallon and, if not, to afford him time to find new counsel.

In its response, the Association moved to dismiss the case for want of prosecution under Rule of Civil Procedure 165a(2), pursuant to which any case not disposed of within the administrative deadlines promulgated by the supreme court was subject to dismissal.[3] It asserted that Whallon had failed to comply with the applicable eighteen-month administrative deadline, that he had no excuse for failing to do so, and that he had not been diligent in pursuing his claims. Specifically,

> there ha[d] been no intervals of actual activity in this matter. [Whallon] never requested a citation for service of process on the Association. . . . [He] literally had years to enter a default judgment against the Association. He never did. [Whallon] never moved to stay this case pending the resolution of the City of Houston lawsuit or for any other reason. [He] never took any steps to engage the Association in this matter and pursue a resolution to this case.

The Association further asserted:

> This case has been languishing on the [trial court's] docket for six years with zero activity. The Association witnesses who would have knowledge of the allegations in [Whallon's cross-claims] are long gone. The Association's documents are gone. [Whallon's] property that is the subject of his lawsuit has been demolished. Many of these problems could have been ameliorated had [Whallon] taken some action to move the case forward when it was first filed or at an earlier time. This is a factor that demands the dismissal of this case for want of prosecution.

---

[3] *See* TEX. R. CIV. P. 165a(2).

In December 2015, after a hearing, the trial court granted Whallon's motion and issued an order retaining the case.

In March 2016, the trial court issued a tenth Notice of Disposition Deadline, stating its intent to dismiss the case for want of prosecution. Whallon moved to retain the case, arguing that the parties had not been able to agree on dates for a proposed docket control order. The trial court issued an order retaining the case and issued a docket control order setting trial for October 31, 2016. Subsequently, the trial court granted a joint motion for continuance and reset trial for March 20, 2017.

On February 20, 2017, the Association filed a second motion to dismiss Whallon's cross-claims for want of prosecution. The Association again asserted that Whallon had failed to dispose of the case within the supreme court's eighteen-month administrative deadline and that he had shown "no interest in pursuing this case." The Association argued that, in the eight years this matter had been pending, Whallon had done "almost nothing to prosecute this case." And, the matter was within 30 days of trial and still "nothing ha[d] been done." The Association noted that Whallon had never requested service of process on the Association with respect to his cross-claims, had answered only very basic discovery, had not identified any experts, and had requested only a single deposition. Further, Whallon, without filing a motion to quash, had simply failed to appear for his properly noticed deposition on December 22, 2016. In his response, Whallon, asserted that dismissal was not

appropriate because he had produced "hundreds" or "thousands" of pages of discovery. The trial court denied the Association's motion to dismiss the case.

In March 2017, as trial approached, the Association filed various pretrial motions and witness and exhibit lists. Three days before trial, Whallon's counsel, Wells, moved for a continuance, asserting that she was grieving the 2014 losses of her brother and sister and was not "physically, mentally, or emotionally" able to proceed with trial. The trial court reset trial for July 31, 2017. In July 2017, the Association deposed Whallon and two other witnesses. Wells attended and participated in the depositions.

Subsequently, the trial court granted the parties' joint motion for continuance and reset trial for October 2, 2017. Trial was later reset for February 5, 2018.

On February 2, 2018, three days before trial, Whallon again moved for a continuance, and Wells moved to withdraw. Wells stated that she was physically and emotionally unable to proceed with trial, citing personal health reasons related to her grief over losing her two siblings in 2014 and her fear surrounding the imminent death of her other brother. The Association filed a response objecting to any further continuance of the case. The trial court denied the continuance.

When the case was called to trial, the Association appeared and announced that it was ready to proceed. It is undisputed that Wells appeared on behalf of

Whallon; however, she announced that she was unable to proceed with trial.[4] The Association then filed its third motion to dismiss the case for want of prosecution, pursuant to Texas Rule of Civil Procedure 165a and the trial court's inherent authority. The Association asked the trial court to take judicial notice of the record in this case and to treat Wells's inability to proceed with trial as a failure to appear. The record does not reflect that Whallon filed a response.

On February 22, 2018, the trial court dismissed the case for want of prosecution, without stating the specific ground. Whallon moved for reinstatement, asserting that his "failure to appear" at trial was neither intentional, nor the result of conscious indifference. The trial court denied Whallon's motion to reinstate.

Dismissal

In his first issue, Whallon argues that the trial court erred in dismissing his cross-claims against the Association because this is "a case of excusable delay" and "good cause." He asserts that the Association did not make an appearance in this case or file an answer "until three and a half years after the severance of the case" and "only two" of the trial court's ten notices of intent to dismiss the case occurred after the answer was filed. He further asserts that, "at the time of dismissal," the parties had "completed substantial discovery, [he] had produced thousands of pages

[4] The transcript of the trial, if any, is not before us.

of discovery, and [he] had been presented for deposition along with several other witnesses."

A. *Standard of Review and Legal Principles*

A trial court "has a duty to schedule its cases in such a manner as to expeditiously dispose of them." *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982). For this reason, the trial court is given "wide discretion in managing its docket, and we will not interfere with the exercise of that discretion absent a showing of clear abuse." *Id.* A trial court abuses its discretion when it acts without reference to any guiding rules or principles or in an arbitrary and unreasonable manner. *City of San Benito v. Rio Grande Valley Gas Co*., 109 S.W.3d 750, 757 (Tex. 2003).

A trial court's authority to dismiss a suit for want of prosecution arises from: (1) Texas Rule of Civil Procedure 165a and (2) the trial court's inherent authority to control its own docket. TEX. R. CIV. P. 165a; *Villarreal v. San Antonio Truck & Equip*., 994 S.W.2d 628, 630 (Tex. 1999). A trial court may dismiss a suit under Rule 165a if (1) a party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice or (2) the case is not disposed of within the time standards promulgated by the Texas Supreme Court under its administrative rules. TEX. R. CIV. P. 165a(1), (2). The supreme court's administrative rules require, with exception not applicable to this case, that, when reasonably possible, civil jury cases

be disposed of "within eighteen months from the appearance date." *See* TEX. R. JUD. ADMIN. 6.1(a)(1), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. F app.

"In addition, the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence." *Villarreal*, 994 S.W.2d at 630. A trial court may consider: (1) the length of time a case has been on file; (2) the extent of activity in the case; (3) whether trial settings have been requested; and (4) the existence of reasonable excuses for delay. *Dobroslavic v. Bexar Appraisal Dist*., 397 S.W.3d 725, 729 (Tex. App.—San Antonio 2012, pet. denied).

"It has long been the case that a delay of an unreasonable duration . . . , if not sufficiently explained, will raise a conclusive presumption of abandonment of the plaintiff's suit." *In re Conner*, 458 S.W.3d 532, 534 (Tex. 2015) (internal quotations omitted). This presumption justifies the dismissal of a suit under either Rule 165a or the court's inherent authority. *Id*. When, as here, the trial court's order does not specify the ground for dismissal, we must affirm the trial court's ruling if it is supported on any proper ground. *City of Hous. v. Thomas*, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ).

B. ***Analysis***

Here, the record supports the trial court's dismissal of this case for failure to comply with the supreme court's eighteen-month administrative deadline. *See* TEX. R. APP. P. 165a(2); TEX. R. JUD. ADMIN. 6.1(a)(1).

The record shows that over eight years elapsed between the inception of Whallon's cross-claims and the trial court's dismissal. Again, however, the supreme court's administrative rules require that civil jury cases, such as here, be disposed of "within eighteen months from the appearance date." *See* TEX. R. JUD. ADMIN. 6.1(a)(1). Whallon asserts that the "appearance date" did not occur until March 26, 2015, when the Association filed an answer to his cross-claims.[5] Even assuming, without deciding, that the appearance date is March 26, 2015 and examining the record between that date and the trial court's February 22, 2018 order dismissing the case, however, over 34 months elapsed with almost no activity by Whallon in prosecuting his claims. He acted only to retain, continue, or reinstate the case. This 34-month period exceeds the supreme court's eighteen-month deadline. *See id.*

---

[5] Generally, when a cross-claim is served upon a party who has made an appearance in the action, "the party so served, in the absence of a responsive pleading, shall be deemed to have pleaded a general denial of the . . . cross-claim." TEX. R. CIV. P. 92. Here, the parties dispute when Whallon actually served the Association with his cross-claims. And, the Association argued in the trial court that it was never served. We need not resolve this issue because, as discussed herein, the 34-month delay between the date Whallon espouses, i.e., the undisputed date that the Association filed its Original Answer to Whallon's cross-petition, and the date of the trial court's dismissal, alone, exceeds the administrative deadline. *See* TEX. R. JUD. ADMIN. 6.1(a)(1).

Courts have found no abuse of discretion in a trial court's dismissing a case for want of prosecution for similar and shorter periods of inactivity. *See, e.g.*, *Smith v. Quada*, No. 10-11-00436-CV, 2013 WL 4400362, at *3 (Tex. App.—Waco Aug. 15, 2013, no pet.) (mem. op.) ("Based on Smith's nearly complete absence of prosecuting his case for almost three years and the absence of a reasonable excuse for his failure to prosecute, we cannot say that the trial court abused its discretion in dismissing the case for want of prosecution under Rule 165a(2)."); *Maughan v. Emps. Ret. Sys. of Tex*., No. 03-07-00604-CV, 2008 WL 2938867, at *5 (Tex. App.—Austin Aug. 1, 2008, no pet.) (mem. op.) (affirming dismissal under Rule 165a(2) after plaintiff failed to show that he diligently prosecuted his case during period of thirteen to fourteen months after he filed suit, without reasonable excuse); *see also Henderson v. Blalock*, 465 S.W.3d 318, 322 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (diligence not shown in case with no apparent activity for three years); *Douglas v. Douglas*, No. 01–06–00925–CV, 2008 WL 5102270, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, pet. denied) (mem. op.) (diligence not shown in case pending eight months with virtually no activity); *Rainbow Home Health, Inc. v. Schmidt*, 76 S.W.3d 53, 56 (Tex. App.—San Antonio 2002, pet. denied) (diligence not shown in suit largely inactive for two years); *City of Hous.*, 838 S.W.2d at 298 (diligence not shown in case pending twelve months without activity, except for motion to retain).

Given the period of inactivity in this case, Whallon had the burden to demonstrate a reasonable explanation for the delay. *See In re Conner*, 458 S.W.3d at 535. The record shows that Whallon repeatedly attributed some of the delay to his counsel's physical and emotional health issues. In *Conner*, the plaintiffs repeatedly attributed their delay to their counsel's health issues, which included a stroke requiring hospitalization and, later, bypass surgery. 458 S.W.3d at 534. The supreme court noted that the plaintiffs had not identified any specific periods of time during which counsel's health issues had occurred and offered no other excuses that accounted for the extent of the delays. *Id.* The supreme court held that the plaintiffs' failure to provide good cause for their delay "mandate[d] dismissal under Rule 165a(2)." *Id.* at 535 (noting that plaintiffs' delays well exceeded eighteen-month administrative rule without reasonable explanation and that trial court "clearly abused its discretion by disregarding the conclusive presumption of abandonment"). Similarly, here, Whallon's assertions do not reasonably explain why he took virtually no affirmative action in this case for almost three years.

Whallon also asserts that, at the time of dismissal, he had "produced thousands of pages of discovery" and "had been presented for deposition along with several other witnesses." Other than evidence that Whallon, and two others, appeared for deposition at the Association's behest, his assertions are not supported by the record before us and do not explain the 34-month delay. The appellant bears the burden of

producing a record showing that the trial court abused its discretion. *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987).

We conclude that the record supports the trial court's order. Thus, we hold that the trial court did not abuse its discretion in dismissing Whallon's cross-claims for want of prosecution. *See* TEX. R. CIV. P. 165a(2).

We overrule Whallon's first issue.

Reinstatement

In his second issue, Whallon argues that the trial court erred in denying his motion for reinstatement because his "failure to appear at a trial" was not intentional or the result of conscious indifference; rather, it was based on his counsel's "inability to proceed at trial." TEX. R. CIV. P. 165a(3).

Rule 165a(3) provides that, following dismissal, a party may move to reinstate the case by verified motion setting forth the grounds for reinstatement. *Id*. A trial court "shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." *Id.* We review a trial court's denial of a motion to reinstate for an abuse of discretion. *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied).

We concluded above that the trial court's dismissal is supported under Rule 165a(2). *See* TEX. R. CIV. P. 165a(2). To obtain reinstatement after dismissal under Rule 165a(2), a plaintiff "must show good cause for the failure to prosecute the suit under the time standards promulgated by the Supreme Court." *Steward v. Colonial Cas. Ins. Co.*, 143 S.W.3d 161, 165 (Tex. App.—Waco 2004, no pet.). The burden is on the plaintiff to place evidence of diligent prosecution before the trial court at the hearing on the motion to reinstate. *See Tex. Sting, Ltd. v. R.B. Foods, Inc*., 82 S.W.3d 644, 649 (Tex. App.—San Antonio 2002, pet. denied).

Here, Whallon did not pursue reinstatement based on dismissal under Rule 165a(2). *See* TEX. R. CIV. P. 165a(2) (failure to prosecute within administrative deadlines). Rather, Whallon, in his motion to reinstate, argued as his sole ground for reinstatement that his failure to appear at the February 6, 2018 trial was neither intentional nor the result of conscious indifference; rather, it was "due to counsel's inability to proceed at trial." *See id*. 165a(1) (failure to appear). Because the trial court's order is supported under Rule 165a(2) and Whallon did not seek reinstatement on that ground, nothing is presented for our review. *See* TEX. R. APP. P. 33.1.

We overrule Whallon's second issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Kelly.